# STATE OF MICHIGAN

# COURT OF APPEALS

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| GARY WARD and CLAUDIA WARD,<br><br>Plaintiffs/Counter-Defendants-Appellees/Cross-Appellants,<br><br>v<br><br>BARRON PRECISION INSTRUMENTS, LLC and HASSAN PROPERTY MANAGEMENT, LLC,<br><br>Defendants/Counter-Plaintiffs-Appellants/Cross-Appellees. | UNPUBLISHED<br>December 20, 2011<br><br>No. 298857<br>Genesee Circuit Court<br>LC No. 03-077358-CH |
| GLENN M. HOWARTH and ANNE M. HOWARTH,<br><br>Plaintiffs-Appellees/Cross-Appellants,<br><br>v<br><br>BARRON PRECISION INSTRUMENTS, LLC and HASSAN PROPERTY MANAGEMENT, LLC,<br><br>Defendants-Appellants/Cross-Appellees. | No. 298879<br>Genesee Circuit Court<br>LC No. 03-077850-CH |

Before: K.F. KELLY, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

In these consolidated property dispute cases, defendants appeal as of right from the trial court's order determining the nature and scope of an easement in a reserved strip of land adjacent to a lake. Plaintiffs cross-appeal as of right from the same ruling. We affirm in part and reverse in part.

## I. FACTS AND PROCEDURAL BACKGROUND

This case is before the Court for a third time. Though many of the facts are not in dispute, a recitation of the case's procedural history is warranted to provide a better understanding of its tortured history.

A dispute arose concerning the rights to a strip of property lying between a row of platted lots and Warwick Lake in the Warwick Farms subdivision. The plat map specifically contains a handwritten note that, "the land lying between Lots 6-11 and Warwick Lake is reserved for the private use of the proprietors." The plat also contains a notation regarding Outlot A, which runs between lots 8 and 9 from Carriage Hill Drive to the reserved strip, that it "is reserved as private easement for the private use of the Lot Owners, Drain Commissioner and public utilities." Defendants own all of the land that was part of the original parcel that was not platted as part of the subdivision. Plaintiffs own lots that abut the reserved strip. Plaintiffs filed suit against defendants, seeking, among other things, an express easement in Outlot A, as well as a declaratory judgment that they were riparian owners. Plaintiffs argued that the platters intended for their lots to extend to the edge of the lake. Defendants maintained that the original platters, William and Edna Hovey, were the "proprietors" within the meaning of the handwritten notation and retained full ownership rights over the reserved strip. On plaintiffs' motion for summary disposition, the trial court found that plaintiffs' lots extended to the edge of the lake and that a private easement existed on Outlot A, which also extended to the lake.

### A. *WARD I*

We reversed the trial court in *Ward v Barron Precision Instruments*, unpublished opinion per curiam of the Court of Appeals, issued January 19, 2006 (Docket Nos. 263616; 263617) (*Ward I*), finding that "because the plat unambiguously shows that the individual lots are separated from Warwick Lake by the reserved strip, the trial court erred in holding that plaintiffs' lots extend to the edge of Warwick Lake." *Ward I*, slip op p 3. Nevertheless, we found that questions of fact remained as to whether plaintiffs possessed an independent interest in the reserved strip and, if so, the scope and nature of that interest. *Id.* The plat was ambiguous in that, "when viewed as a whole, other portions of the plat suggest that the term 'proprietors' may not have been intended to refer solely to the Hoveys." Instead the plat indicates that the proprietors would "hold less than a full ownership rights in the reserved strip" and Outlot A. *Id.* at slip op p 4. We also considered the testimony of Edna Hovey that she and her husband "intended for all lot owners to have access to Warwick Lake" and, in fact, access to the lake was a "selling point." *Id.* at slip op p 5. Thus, "the evidence submitted below tends to show that if plaintiffs possess any interest in the reserved strip, it is only an easement interest" as opposed to in fee. *Id.* The trial court erred in finding that plaintiffs possessed full riparian rights to the reserved strip and in finding that the scope of the easement for Outlot A was to the edge of the lake. *Id.* at slip op p 6. "If, on remand, the trial court determines that the reserved strip and Outlot A form adjoining easements to allow access to Warwick Lake, its order should reflect that this does not give rise to full riparian rights." *Id.*

On remand the trial court determined that the term "proprietor" as used in the plat actually meant "lot owners" and that the reserved strip was "available for the private use of the lot owners." Regarding the scope of easement the trial court found: "Now what does – what

else does this mean? Well it means that the lot owners have adjoining easements. They have an adjoining easement with Outlot A and an easement with the reserve[d] strip to have access to the lake as well as to have reasonable use of the reserve[d] strip." However, as a matter of equity, the trial court concluded that defendants, who were ultimately responsible for the land and lake in terms of taxes and "taking care of it and keeping it up," were entitled to "set the rules for the use of the lake and the land, as long as their rules are reasonable. And, so long as they set reasonable rules for the use of the land and the use of the lake, those rules should and must be followed by the lot owners that are accessing the lake or using the reserve[d] strip." The trial court left "for another day" whether plaintiffs should share in the burden of upkeep of the lake. The following exchange took place between defendants' attorney and the trial court:

> MS. FRIEDLAENDER: That's the other question. So the lots that are fronting on the lake, okay, do they get to use all the land that would be between their extended lot lines: is that their entire easement?
>
> THE COURT: I think because of that dedication, it talks about the reserve strip and the use of the reserve strip – and I've said that the term "proprietor" that refers to the lot owners – yes, it would; any part of that reserve strip, they would have access to it, absolutely!
>
> MS. FRIEDLAENDER: They'd have an easement.
>
> THE COURT: For their private use, yes.
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> MS. FRIEDLAENDER: Not limited to ingress and egress to the lake?
>
> THE COURT: No, because it says for the private use; it does not limit it to ingress or egress, so my comment earlier – I think I made the comment about Mrs. Howarth being able to walk her dog along the easement and reserve strip. She can walk along the reserve strip, but again they have to use it on – on a reasonable basis. It has to be reasonable whatever they – I mean, they can't go out there and put picnic tables up and all this kind of thing or really put anything that I think – up on this reserve strip. They can use it, reasonably, but – and then, as I've indicated, [defendants] are gonna have the right to set up reasonable rules for the use of the reserve strip as well as the lake; and so that's how this is gonna work. Because the dedication does not re- uh, limit it to ingress and egress; it says for their private use. So I guess they can walk their dog along the strip, I guess would be a reasonable use, as long as they have a pooper scooper. . .

### B. *WARD II*

All parties appealed the trial court's order after remand and we affirmed the trial court in all respects except for the reasonable use and maintenance of the reserved strip. *Ward v Barron Precision Instruments, LLC*, unpublished opinion per curiam of the Court of Appeals, issued May 26, 2009 (Docket Nos. 280461; 280462) (*Ward II*), lv den 485 Mich 1010 (2009). We rejected defendants' contention that the trial court erred in finding that plaintiffs had an irrevocable easement, as opposed to a mere revocable license interest in the strip. *Ward II*, slip op pp 4, 8. We also held, however, that the trial court erred in making defendants solely

responsible for the upkeep and maintenance of the reserved strip. *Id.* at 6. In ordering that the case be remanded a second time, we stated:

> We conclude that the trial court erred when it gave defendants exclusive rights to maintain the easement. It appears that plaintiffs and the other subdivision lot owners have a duty to maintain the easement under Michigan law. Furthermore, the grant of an easement includes "such rights as are incident or necessary to the enjoyment of such right or passage." The reasonableness of the means used to maintain or use an easement is a question of fact to be determined by the trial court or jury. Therefore, the reasonableness of use and maintenance of the reserved strip is a question of fact to be determined by the trial court.
>
> Where an easement does not specifically denote its acceptable uses, then the surrounding circumstances may be considered to ascertain the intent of the parties. In determining the scope of permissible use by non-riparian owners *Dobie*, *supra*, provides this Court with guidance. In *Dobie*, *supra*, this Court stated that the intent of the plattors should be determined by referencing the language used in the instrument in conjunction with the facts and circumstances existing at the time of the grant. The Court went on to endorse the idea that the extent of the non-riparian owners' dedicated use also may be determined according to the traditional and historical use of the easement area.
>
> Here, the parties provided the trial court with evidence about the historical and traditional uses and maintenance of the easement. This Court's language in *Dobie* indicates that the trial court may use this information to determine the scope of the subdivision lot owners' use and maintenance of the easement.
>
> It is not the role of this Court to create rules in this situation. Therefore, we remand this issue to the trial court with the specific instruction that the subdivision lot owners must be allowed to reasonably use and maintain the reserved strip. We leave the scope of that use and maintenance to the trial court. We remind the trial court that the reasonableness of the rules should be determined in light of the testimony about the intent of the original plattors as to how the reserved strip was to be used and maintained as well as testimony about the historical and traditional uses and maintenance of the property. Finally, we note that he who seeks equity must do equity as a reminder to the parties that although the trial court has some legal guidance in this matter, where the law is silent, the trial court is proceeding in equity. All parties should be mindful that their behavior regarding the reasonable use and maintenance of the reserved strip is relevant to the trial court's ultimate resolution of this matter. [*Id.* at 7.]

On second remand, the trial court instructed the parties to file briefs addressing the scope of the lot owners' use and maintenance of the reserved strip. Defendants raised concerns about maintaining the lake, arguing that certain fertilizers used in lawn care posed a hazard to the lake's health. Defendants also raised concerns about mowing and removing vegetation, believing that some of the property was wetlands. Defendants wanted to reopen proofs to determine the scope of the easement. The trial court declined to entertain additional testimony.

It determined that no legal analysis was necessary and that its sole job was to "determine through the testimony presented on the historical and traditional uses and maintenance of the property, what reasonable use and maintenance of the easement is to be allowed the plaintiffs and Lot Owners."

The trial court considered testimony regarding the previous usage of the reserved strip and the lake from Edna Hovey, one of the original plattors, Jack Sweet, who was a lot owner from 1963 to 1973 or 1974 and an officer and owner of American Community Development Corporation (one of the proprietors of the plat), and Walter Janke, who purchased lot 8 in 1967 and built his home shortly after the subdivision was platted. However, because it concluded that evidence of the historical and traditional uses of the property had to be "contemporaneous with the original plat of the property," the trial court disregarded testimony from Sadie Davis Graham, a former lot owner who had purchased her home in 1989 (and was the Howarths' predecessor in title), plaintiff Anne Howarth, who purchased her property in 1995, and plaintiff Gary Ward, who purchased his property in 1999. The trial court also disregarded testimony by defendants' witnesses, concluding they "provided little to no additional insight into the historical and traditional usage and maintenance of the easement and lake."

Based on its review of the record, the trial court held:

> [T]he scope of the use and maintenance of the easement is as follows: The Plaintiffs, as well as the Lot Owners owning property which is adjacent to the lake, must reasonably maintain the easement adjacent to their land as well as the portion of Warwick Lake adjacent to their property. This includes mowing or cutting weeds and using chemicals to control weeds providing that such chemical usage is in compliance with the regulations and requirements of the State of Michigan and the Department of Natural Resources and Environment. Those portions of Warwick Lake which extend beyond that immediate portion adjacent to the easement owner's property must be maintained by Defendant owners. As applicable to removal of trees and landscaping, and as stated by the Court of Appeals, because it is the "owner of the easement, rather than the owner of the servient estate, who has the duty to maintain the easement in a safe condition so as to prevent injuries to third parties" the Plaintiffs and Lot Owners must maintain and use the easement in a safe and reasonable manner. Michigan Court of Appeals, May 26, 2009, pp. 7 (Docket No. 280461) (*citing Morrow v Boldt*, 203 Mich App 324, 329; 512 NW2d 83 (1994)). This includes tree removal for the safety of themselves and any third party but does not include tree removal for aesthetic purposes or the planting of trees or other landscaping which would only be for aesthetic purposes. Any maintenance actions taken on the easement must be solely with regard to generalized cleaning and maintenance of the reserved strip and any action which is required for the safety of the easement owners and third parties. With regard to recreational usage of the easement, there exists a historical basis and no undue burden placed on the servient estate should the plaintiffs and other Lot Owners be allowed to use the easement for general recreational purposes including: picnicking, sun bathing, walking, sledding in the winter, and the like. As to the use of Warwick Lake, the record is replete with historical and traditional uses including boating, fishing, swimming, camping and

> walking on the island located on the lake, as well as skating and hockey in the winter. There exists no historical basis, however, for the building of boat docks by the easement owners. Those docks already existing may remain. There also appears no historical basis for the use of motorized boats on Warwick Lake. This aforementioned historical usage and maintenance is equally applicable to those Lot Owners who do not own property which is adjacent to Warwick Lake but have access to such through Outlot A. . . . [T]he easement owners must not change the topography of the easement unless required for the safety of Lot Owners and any third party.

Other than the right of ingress/egress to Warwick Lake, defendants appeal from the rights granted by the trial court to plaintiffs and the other lot owners. Plaintiffs cross-appeal from the trial court's limiting their maintenance of Warwick Lake to that portion immediately adjacent to their property, as well as its denial of the right to erect new docks, use motorized boats, and landscape for aesthetic purposes.

## II. STANDARD OF REVIEW

The grant of an easement includes "'such rights as are incident or necessary to the enjoyment of such right or passage.'" *Lakeside Assoc v Toski Sands*, 131 Mich App 292, 299-300; 346 NW2d 92 (1983), quoting *Harvey v Crane*, 85 Mich 316, 322; 48 NW 582 (1891). The reasonableness of the means used to maintain or use an easement is a question of fact. *Id*. at 300; see also *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). This Court reviews a trial court's factual determinations for clear error, but reviews de novo any decisions made in equity. *Blackhawk Dev Corp*, 473 Mich at 40.

Additionally, whether a trial court followed an appellate court's ruling on remand is a question of law that we review de novo. *Schumacher v Dep't of Natural Resources (After Remand)*, 275 Mich App 121, 127; 737 NW2d 782 (2007). "The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court." *K & K Constr, Inc v Dep't of Environmental Quality (After Remand)*, 267 Mich App. 523, 544, 705 NW2d 365 (2005). The lower court is free "on remand to consider and decide any matters left open by [the appellate] mandate." *Grievance Administrator v Lopatin*, 462 Mich 235, 261, 612 NW2d 120 (2000). "However, when an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order." *K & K Constr, Inc*, 267 Mich App. at 544.

## III. ANALYSIS

### A. RELEVANT TESTIMONY

Defendants argue that the trial court erred by considering evidence other than Hovey's testimony, while plaintiffs argue that the trial court erred in excluding some relevant testimony. In *Ward II*, we expressly instructed the trial court to consider on remand the evidence already provided by the parties regarding the traditional and historical uses and maintenance of the property. *Ward II* slip op p 7.

Defendants argue that Hovey's testimony indicated a clear intent to grant the lot owners only an ingress/egress right. We note that defendants failed to appeal the trial court's prior determination that the easement granted more than ingress/egress rights in the previous appeal. See *Ward II* slip op p 2. Indeed, neither party challenged that holding. Therefore, our remand must be understood as directing the court to determine the historical and traditional uses of the reserved strip above and beyond ingress/egress. Under the law of the case doctrine, "this Court's ruling on an issue in a case will bind a trial court on remand and the appellate court in subsequent appeals." *Schumacher*, 275 Mich App at 127.

Defendants acknowledge that *Dobie v Morrison*, 227 Mich App 536; 575 NW2d 817 (1998), permits consideration of historical and traditional use evidence. However, citing *Higgins Lake Prop Owners Assoc v Gerrish Twp*, 255 Mich App 83; 662 NW2d 387 (2003), and *Coyne v Daneluk*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2005 (Docket No. 261535), defendants argue that any uses occurring after the platting should not have been considered. However, *Higgins* expressly concluded that *Dobie* was inapplicable to its facts because it "involved rights to a park, not to road ends." *Higgins*, 255 Mich App at 103. In addition, *Higgins* was looking at public rights, not the rights of the subdivision owners. *Higgins* provides only a broad generalization about not accepting evidence of uses made after platting occurs. Still, regardless of whether *Higgins* provides a bright-line rule, it does seem to require that the historical and traditional uses be roughly contemporaneous with the plat.

The trial court recognized the responsibility to limit the historical and traditional use evidence to that which was contemporaneous with the plat and attempted to do so. It relied on the testimony of Hovey and Sweet, who purchased his lots in 1963, the year the subdivision was platted, and Janke, who purchased his lot in approximately 1967. The trial court declined to consider use evidence from purchasers in 1974, 1989, 1995, and 1999. Thus, the only "use" testimony the trial court considered that occurred after platting was from Janke, the 1967 purchaser.

Although *Coyne* is only persuasive authority, MCR 7.215(C)(1), we conclude that the trial court's consideration of Janke's testimony was not clear error. *Coyne* involved a trial court's determination "that those parties owning back lots within the subdivision have an easement over the strip of beach along their property for recreational purposes." *Coyne*, at slip op p 1. Although uses occurring after dedication were generally not helpful in determining the dedicators' intent, "statements to prospective purchasers shortly after creating the subdivision plat and the actual use of the beach at that time are clearly relevant and useful in determining . . . intent." *Id.* at slip op p 4-5. The panel in *Coyne* considered evidence of uses that occurred after platting highly relevant. Furthermore, *Coyne* expressly distinguished *Higgins* and held that "easement rights in a beach are [not] equivalent to traditional easement rights in a right-of-way or road end." *Id.*, at p 5.

In the present case, the facts are more similar to *Coyne* than *Higgins*, in that we are dealing with a private easement for lot owners rather than road ends and easements for the general public. In addition, Janke was an original purchaser in the subdivision, buying his lot only a few years after the platting took place. There was also evidence that Janke believed he was purchasing waterfront property based on representations made to him. In light of *Coyne*'s holding that statements to prospective purchasers and actual use of the beach at that time were

relevant to determining the plattor's intent, we conclude that the trial court did not clearly err in considering Janke's testimony and in limiting its consideration of the testimony to the time contemporaneous to the plat's creation.

## B. DOCKS

Defendants next argue that the trial court erred in concluding that the scope of the easement included maintenance of existing docks. On cross-appeal, plaintiffs argue that the trial court erred in denying them the right to build new docks. We find no clear error in either decision.

As noted above, Hovey's expressed intent that there would be no restrictions or limitations necessarily implies that dock construction and usage was intended. In addition, Sweet testified that it was the intent of the plattors to permit docks, and that lot owners in fact docked their boats. The plattor intended docking rights to be included in the scope of the easement. The right to maintain the existing docks is impliedly permitted in the trial court's findings that existing docks could remain.

Contrary to defendants' assertion, permitting docking rights to the lot owners is in keeping with this Court's holding in *Ward I*. In *Ward I*, this Court held that the lot owners were not riparians; however, we then noted that "'Michigan law clearly allows the original owner of riparian property to grant an easement to backlot owners to enjoy certain rights that are traditionally regarded as exclusively riparian.'" *Id*. at slip op p 6. Thus, the lots owners' status as non-riparians did not prevent the plattors from including dock maintenance rights within the scope of the easement. See also *Cabal v Kent Co Rd Comm*, 72 Mich App 532, 536; 250 NW2d 121 (1976) (permitting docking rights to nonriparians where the easement granted fishing and boating rights).

Plaintiffs argue that the trial court's grant of maintenance rights in the existing docks, without permitting the right to construct new docks, is inconsistent. We disagree. We see nothing inconsistent with holding that maintenance of existing docks is permitted but new construction is not, because such a result appears to be an equitable balance between the lack of any historical testimony regarding construction of docks and the evidence that there were no restrictions on the use of the reserved strip and at least one of the permanent docks has existed over 20 years, although not since the time of platting.

Furthermore, even if there were sufficient testimony to conclude that construction of new docks was intended to be within the scope of the easement, we would still find no error. Our Supreme Court has held:

> If the easement grants [a party] the right to construct or maintain a dock, the trial court must determine whether the particular dock at issue is permissible under the law of easements. Under our well-established easement jurisprudence, the dominant estate may not make improvements to the servient estate if such improvements are unnecessary for the effective use of the easement or they unreasonably burden the servient tenement. Accordingly, if the trial court concludes that the easement grants defendants the right to construct or maintain a

> dock, it must then determine (1) whether the dock is necessary for defendants' effective use of their easement and (2) whether the dock unreasonably burdens plaintiffs' servient estate. [*Little v Kin*, 468 Mich 699, 701; 664 NW2d 749 (2003) (citations omitted).]

Plaintiffs' proposal that "Lots 6, 7, 8, 9, 10, and 11 have the right to install docks on the shoreline parallel to their lake side lot lines and that the owners of Lots 1-5 could have a shared dock parallel with the lake side line of Outlot A," unreasonably burdens defendants' servient estate by substantially increasing dockage rights. Although new construction would certainly overburden the easement, as would expansion of the existing docks, repair and replacement of the existing docks would create no undue burden. The right to maintain already-existing docks is implied in the trial court's order.

## C. ISLAND

Defendants next argue that the trial court erred in granting plaintiffs and the other lot owners the right to use "the island" within the lake. We find that the trial court's consideration of the issue exceeded the scope of remand. In *Ward II*, we specifically held "that the subdivision lot owners must be allowed to reasonably use and maintain the *reserved strip*. We leave the scope of that use and maintenance to the trial court." Because use of the island was not at issue on remand, the trial court's findings exceeded the scope of our order. *K & K Constr, Inc*, 267 Mich App. at 544.

## D. GENERAL RECREATIONAL PURPOSES

Defendants next argue that that there was no historical or traditional evidence to support uses such as sunbathing, picnicking, sledding, walking, and similar activities. The trial court held that there was "a historical basis," and that no undue burden was created by permitting plaintiffs to engage in "general recreational purposes." We agree with the trial court.

There was specific testimony regarding the historical and traditional use of the reserved strip for walking, sledding, sunbathing and picnicking. Sweet testified that "we all had dogs, chased pheasants, did everything" on the land around the lake. Given Hovey's testimony that no restrictions were placed on the use of the reserved strip, the conclusion that the easement rights included more than simply ingress/egress rights, and Sweet's contention that people "did everything" on the land, there is no clear error in the trial court's determination that normal beach uses such as picnicking, sunbathing, and other similar activities were intended within the scope of the easement.

## E. RESERVED STRIP MAINTENANCE

Defendants next claim that the trial court erred in dividing maintenance of the reserved strip. We disagree.

In *Ward II*, this Court held that the trial court erred in making defendants solely responsible for the upkeep and maintenance of the reserved strip:

A trial court has jurisdiction to ensure that both parties can use an easement without impediment. *WPW Acquisition Co v City of Troy* (*On Remand*), 254 Mich App 6, 9; 656 NW2d 881 (2002). "The owner of the fee subject to an easement may rightfully use the land for any purpose not inconsistent with the easement owner's rights." *Morrow v Boldt*, 203 Mich App 324, 329; 512 NW2d 83 (1994). "*However, it is the owner of the easement, rather than the owner of the servient estate, who has the duty to maintain the easement in a safe condition so as to prevent injuries to third parties.*" *Id.* at 329-330 (emphasis added).

We conclude that the trial court erred when it gave defendants exclusive rights to maintain the easement. It appears that plaintiffs and the other subdivision owners have a duty to maintain the easement under Michigan law. Furthermore, the grant of an easement includes "such rights as are incident or necessary for the enjoyment of such right or passage." *Lakeside Assoc*[] *v Toski Sands*, 131 Mich App 292, 299-300; 346 NW2d 92 (1983). The reasonableness of the means used to maintain or use an easement is a question of fact to be determined by the trial court or jury. *Id.* at 300. Therefore, the reasonableness of use and maintenance of the reserved strip is a question of fact to be determined by the trial court.

* * *

. . . Therefore, we remand this issue to the trial court with the specific instruction that the subdivision lot owners must be allowed to reasonably use and maintain the reserved strip. We leave the scope of that use and maintenance to the trial court. [*Ward II*, at p 7.]

On remand, the trial court held:

The Plaintiffs, as well as the Lot Owners owning property which is adjacent to the lake, must reasonably maintain the easement adjacent to their land as well as the portion of Warwick Lake adjacent to their property. This includes mowing or cutting weeds and using chemicals to control weeds providing that such chemical usage is in compliance with the regulations and requirements of the State of Michigan and the Department of Natural Resources and Environment. Those portions of Warwick Lake which extend beyond that immediate portion adjacent to the easement owner's property must be maintained by Defendant owners.

As an initial matter, we find meritless defendants' assertion that this holding is inconsistent with the holdings in *Ward I* and *Ward II* that all the lot owners had an easement in the reserved strip. Nothing in the trial court's order limits the easement rights of any lot owners. Indeed, the order explicitly provides that "[w]ith regard to recreational usage . . . plaintiffs and other Lot Owners [are] allowed to use the easement for general recreational purposes." Thus, although the order segmented maintenance duties, it expressly granted all lot owners the same rights to the entire easement. In addition, the trial court's holding does not appear to create uncertainty regarding who has the duty to care for the reserved strip. The trial court held that lot

owners owning property adjacent to the lake "must maintain the easement adjacent to their land." There is nothing ambiguous about this language.

Though the order does not expressly provide who is to maintain that portion of the reserved strip that extends from Outlot A to the lake, we conclude that those lot owners who have the easement in Outlot A (lots 1-5)—and, therefore, the duty to maintain Outlot A—have the attendant duty to maintain that portion of the reserved strip that runs from Outlot A to the lake. In this way, all lot owners who benefit from the easement are required to maintain some portion of it and it is easily determinable who is responsible for which portions in the event that such maintenance and upkeep are not done.

## F. LAKE MAINTENANCE

Both defendants and plaintiffs take issue with the trial court's holding regarding lake maintenance. The trial court effectively segmented maintenance of the lake by requiring plaintiffs to "reasonably maintain the easement adjacent to their land as well as the portion of Warwick Lake adjacent to their property." The trial court's ruling essentially leaves maintenance of the remainder of the lake to defendants. Plaintiffs argue that they should be able to treat and maintain the entire lake. Defendants argue that allowing plaintiffs to maintain any portion of the lake threatens the health and ecology of the lake as a whole and may also violate laws relating to chemical treatment of lakes and wetlands. We disagree with both positions.

The trial court properly determined that plaintiffs had the right and duty to maintain the portion of the lake adjacent to their property. There was ample evidence in the record to support a finding that plaintiffs and their predecessors historically and traditionally treated that portion of the lake with chemicals in order to control weed growth and enhance their ability to enjoy the lake. Maintenance of the lake immediately adjacent to the reserved strip clearly touches upon plaintiffs' right to use and enjoy the reserved strip.

Regarding chemical maintenance of the lake, defendants are correct that, prior to chemically treating the lake, the lot owners would need defendants' written permission. MCL 324.3303(2)(d), (4)(d). However, because the trial court's order expressly requires the lot owners to comply with the regulations and requirements of the State of Michigan, these rules are necessarily implied. Thus, defendants' concern that the order did not expressly require plaintiffs to receive written approval is without merit. When defendants' written consent is required by law, upon proof that the maintenance is reasonably necessary for the easement holders' continued use and enjoyment of the easement, defendants shall not unreasonably withhold permission; and, in the event that there are regulations related to mechanical weed maintenance, the lot owners must comply with them.

## G. LANDSCAPING

In their cross-appeal, plaintiffs assert that the trial court improperly limited tree planting and removal and landscaping to safety purposes, denying such acts for aesthetic purposes. We disagree. Because plaintiffs have the legal duty to maintain the easement in a safe condition so as to prevent injuries to third parties, the trial court properly granted them the right to remove trees for safety purposes. To the extent that landscaping and tree planting is necessary to prevent

erosion of the reserved strip, such action falls under the duty to maintain the easement. As for denying them the right to plant or remove trees or landscape for aesthetic purposes, there is nothing clearly erroneous about this limitation. Although there is certainly testimony from Janke that he planted trees and a vegetable garden, we conclude that granting all eleven of the lot owners the unrestricted right to plant trees and landscape on the reserved strip for aesthetic purposes would unduly burden defendants' land. Indeed, one lot owner's landscaping could interfere with another lot owner's reasonable use of the reserved strip. Given how many different interests needed to be balanced, the trial court's determination was equitable and not clearly erroneous.

Defendants assert that the trial court should have granted them "the right to remove the existing turf and replace it with native plantings and other wetland friendly vegetation" so long as it does not interfere with plaintiffs' "right of access and use of the lake." This argument ignores that plaintiffs and the other lot owners have more than simply ingress/egress rights to the reserved strip. Second, defendants are seeking the right to remove *existing* turf. That is, defendants seek the right to unilaterally change what is clearly the traditional and historical usage of the reserved strip. Here, where the lot owners have rights such as walking, picnicking, and sunbathing, the type of turf currently in existence may be necessary to their reasonable use and enjoyment of the easement. Furthermore, there is no evidence to support defendants' conjecture that their plan would require less maintenance expense for the lot owners and provide aesthetic and environmental benefits. Because defendants are the servient estate holder and they have provided no evidence that the removal of such turf would not interfere with the lot owners' easement rights, the trial court did not clearly err in denying defendants the right to unilaterally alter the existing turf/vegetation.

## H. MOTORIZED BOATS

Finally, plaintiffs argue that the trial court erred by failing to consider defendants' own testimony and conduct when it concluded that there was no historical basis for use of motorized boats on Warwick Lake. Again, we find that the trial court's consideration of the issue exceeded the scope of remand. In *Ward II*, we specifically held "that the subdivision lot owners must be allowed to reasonably use and maintain the *reserved strip*. We leave the scope of that use and maintenance to the trial court." Because use of motorized boats was not at issue on remand, the trial court's findings exceeded the scope of our order. *K & K Constr, Inc*, 267 Mich App. at 544.

We affirm in part, reverse in part. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter